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MAY 18 1965
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No. 3888

In the Supreme Court of the United States

October Term, 1964

Ahtanum Irrigation District, a corporation, and The State of Washington, et al,
Petitioners,

vs.

United States of America,
Respondent.

REPLY BRIEF OF PETITIONERS

John J. O'Connell
Attorney General

Charles B. Roe, Jr.,
Assistant Attorney General

Attorneys for Petitioner, State of Washington
Temple of Justice
Olympia, Washington

Fred C. Palmer
806 Miller Building
Yakima, Washington

John Cavin
410 Miller Building
Yakima, Washington

Northcutt Ely and
Jerome C. Muys
Tower Building
Washington 5, D. C.

Attorneys for Petitioners, Ahtanum Irrigation District, et al

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1026

AHTANUM IRRIGATION DISTRICT, a corporation, and THE STATE OF WASHINGTON, et al,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

Petitioners wish to reply to the brief of the United States in opposition to petition for writ of certiorari as follows:

COUNTER STATEMENT

The District Court and the Special Master did not award 75% of the total flow of Ahtanum Creek to the petitioners (Resp. Br. p. 3) but only awarded to the petitioners 75% when the measured flow of the creek is 76.3 c.f.s., or less, the maximum being limited to 57.2 c.f.s. All of the flow of the creek above 76.3 c.f.s. was awarded to the United States (Appendix F, p. 178 and G. p. 183).

Petitioners did not fail to show use of the creek's

water after July 10, but, on the contrary, did show such use (Pet., p. 24-28; R. 11988-13643; References are detailed in "Supplement to Petition for rehearing" filed with Court of Appeals; Appendix D, pp. 111-112). The Court of Appeals did not award all of the water in the Creek to the United States after July 10th because of an alleged failure of the petitioners to show use after July 10, but because the Court of Appeals found no water was available for use after this date.

REPLY TO ARGUMENT OF RESPONDENT

Petitioners disagree that the Court of Appeals correctly construed the 1908 Agreement, and, on the contrary, contend that such construction conflicts with decisions of this Court, decisions of the Courts of Appeals, and applicable decisions of the Supreme Court of the State of Washington.

Its construction further ignores the obvious intention of the contracting parties.

1. By the 1908 Agreement, the United States divested itself of 75 per cent of the waters of Ahtanum Creek. It not only agreed to "limit and define" its claim to 25 per cent of the natural flow of the creek, but it also "surrendered and conceded" 75 per cent of the natural flow to the north side water users. (Pet. p. 13) The petitioners have always contended and now contend that the 1908 Agreement conveyed waters of the creek to them

(App. H, p. 187). But the important legal effect of the 1908 Agreement is not found in the verbiage used, but in the fact that it accomplished a *permanent* disposition and division of the waters of the creek, and in the fact that it did *not* limit the division and use of the natural flow to any date in the middle of the irrigation season, such as the date of July 10 selected by the Court of Appeals.

The Court of Appeals found, not so much that the waters of the creek were not used by those on the north side after July 10, as that there was *no water available* in the creek after July 10, and that this was the reason for its alleged nonuse. (App. I, pp. 210-214). This, of course, is the basic error which the Court of Appeals has committed and which will produce such disasterous results if its opinion is not reversed. Far from the evidence being uncontradicted as to nonavailability and nonuse of water after July 10, there was substantial evidence that water flows in the creek after July 10 of each year, has continued to flow after July 10 in each year, and has been used by the north side users after July 10 in each year. (R. 314-318; 11988-13643; Supplement to Petition for Rehearing; App. D, p. 111-112). The Special Master and the District Court made findings relating to the existence and continuing use of water by the north side for the entire irrigation season, which were improperly superseded by the Court of Appeals in its opinion. (App. F, p. 169).

The contention of the United States in its brief that

it is unlikely that the parties to the 1908 Agreement intended to control the use of water after July 10 is unsupported by the facts and unsupported by reality. It is a distorted and incredible interpretation of the 1908 Agreement to say that the parties who were to share a diminishing supply of water, which began to make itself felt in July and diminished through July and into August and September, would enter into an agreement which only provided and was intended to provide for a division of waters prior to July 10 and not to apply to the use of the waters after July 10 when they were most needed. The parties certainly did not write any such provision into their agreement, and it would have been easy for them to so do if they had actually had such a peculiar provision in mind.

2. The Court of Appeals did erroneously construe "natural flow" as it clearly found no water available after July 10th in 1908 when it stated as follows:

> " . . . . . This method of farming was largely the result of the fact that by the first of July each year, generally speaking, the supply of water had greatly diminished so that because of the porous condition of the bed of Ahtanum Creek, the water flowing therein sank out of sight. Thus one witness for the defendants who had testified with respect to a number of parcels of land there, one of which he owned in 1908, testified as follows: 'Early in the year, I irrigated, but later in the year I did not because you had no water.' Describing the land he said: 'A. You could raise good crops on it if you had the water. Q. But you did not have water? A. After July. Q. After July what, first? A. The first part of July.' "

(Appendix I, pp. 210-211)

> "An examination of the testimony of the witnesses on whom the defendants relied for proof of their use, or of their predecessor's use, of water for irrigation in 1908, discloses a complete unanimity as to the fact that water for irrigation was generally not available after the first of July each year; . . . . ."

(Appendix I, pp. 213-214)

"Natural flow" means the flow during the entire year, including the summer irrigation season. (Pet. Br. p. 20) There was "natural flow", albeit diminished, during the entire irrigation season. (Pet. Br., pp. 26-27)

The United States asserts the agreement was construed by the Court of Appeals as being applicable in dividing the waters of Ahtanum Creek only during the time of abundant run-off in the spring and early summer. This construction is astounding since it would make simpletons out of the Secretary of Interior, Chief Engineer of the Bureau of Indian Affairs Code, United States District Attorney Avery, acting for the Government, and the pioneer settlers' Committee acting for the north side users. It has these parties, earnestly seeking a solution to this troublesome question, dividing the waters only for that period of time when they did not need to be divided and ignoring the period of short supply when they required division. Obviously the reverse is the true situation. The contracting parties were not concerned with the period of abundant run-off in the spring.

3. The findings of fact by the Special Master and adopted by the United States District Judge Lindberg relating to diversion requirements or duty (Pet. Br., p. 25) were based upon both need and use. This was made crystal clear in Judge Lindberg's Opinion when he stated:

> " . . . . . The nature of the action remained the same and required *a determination of the need and use of Ahtanum waters as well as* the deraignment of title by defendants to the lands to which any *conceded* water rights *secured* under the agreement became appurtenant."

> " . . . . . *The principal issue thus becomes one of determining with reasonable exactness the volume of flow surrendered to the north side users in the aggregate. This determination under the general direction of the Court of Appeals is to be based upon evidence of title, need and use by the north side defendants as of 1908. For this purpose a tract by tract analysis is necessary to ascertain whether the beneficiaries and their successors claiming under the agreement had in fact sufficient ownership, need, and use as to such tracts to justify an award of the full volume of water conceded to them as a group. If proved as of 1908 and later titles are deraigned as well as need and use overall maintained to the extent that the entire 75% of the volume of water is still required that volume should be awarded to defendants collectively under the provisions of the agreement.*"

(Appendix E, pp. 150-152)

The District Judge in his conclusions of law further stated:

> "4. That the plaintiff and the answering defendants have sufficiently deraigned their titles to lands bene-

> fited by the waters of Ahtanum Creek under the provisions of the agreement of 1908. That said parties have sufficiently proved needs as *well as beneficial use* of Ahtanum waters in 1908 and 1957 so that a precise measurement of the natural flow and a percentage division thereof, in the aggregate, of said waters may be made."
>
> (Appendix F, Conclusion of Law 4, p. 177) (Emphasis supplied)

As pointed out, *supra*, the Court of Appeals did rest its finding on an erroneous conclusion that Ahtanum water ceased to flow and hence was not available after July 10th. The District Court found, and the record supports, the availability and use of the water by the petitioners after July -10th.

4. The decision of the Court of Appeals limiting the natural flow of Ahtanum Creek as divided by agreement of the parties to July 10 in each year is contrary to the decisions of the Supreme Court of Washington defining natural flow, which decisions had been rendered prior to 1908 and were in effect at the time the parties entered into the contract. The United States in its brief points to no decision in the State of Washington which would indicate that natural flow does not mean the continuing and uninterrupted flow of the creek without diminution or alteration. The Court of Appeals in its decision did not discuss the decisions of the State of Washington on this point. It is submitted that when a decision of a Court of Appeals is contrary to the law of a State in a situation in

which the State law should be given weight in determining the intention of contracting parties, and when such an erroneous application of that law will result in a manifest injustice to those who entered into the contract (and particularly when the United States is the other party), that there then exists an impelling reason for granting certiorari under the principles established by this Court in its Rule 19.

5. The agricultural economy of the north side of Ahtanum Creek will be ruined by the decision of the Court of Appeals. There can be no successful contention made that the elimination of all irrigation water in the middle of an irrigation season in a dry and arid country will not dry up any crops being raised. Nor can the economy be sustained without domestic and stock water. It makes little difference whether the United States concedes this to be true or not — it is an unfortunate fact.

It is not true that the United States would be in the same position as these petitioners had the opinion of the Court of Appeals upheld the District Court. No one has ever sought to take away any water from the United States to which it was entitled under the 1908 Agreement. It is only the United States which has sought to deprive the petitioners of the waters transferred to their predecessors in interest and to them by the Agreement.

Neither did the petitioners or those who were parties

to the 1908 Agreement continue to farm through all of these years with an awareness that "if their construction of the Agreement was judicially rejected" that they might be without water. The construction of this Agreement adopted by the Court of Appeals never saw the light of day until that decision was handed down in 1964. No party to the Agreement, to any subsequent controversy, nor to this litigation ever contemplated that the agreement was intended to apply only until July 10th in each year, and that thereafter all of the water flowing in the creek would be transferred to the United States. It is true that at the time this litigation was commenced by the United States in 1947, the petitioners were threatened with the contention that the 1908 Agreement was invalid and that all of their water might be taken from them. But this contention was disposed of in 1956 by the Court of Appeals when it held the 1908 Agreement to be a valid exercise of authority by the Secretary of the Interior. There may have been controversy over the years about what percentages of water each side would receive for the entire irrigation season, but there certainly has never been any threat or risk that the diminished flow of irrigation water available in the middle of the irrigation season would be cut off entirely from one side and transferred to the other side.

CONCLUSION

For all the reasons advanced in the petition for certiorari and advanced herein, we respectfully submit that this is a proper case in which certiorari should issue to review the decision below.

Respectfully submitted,

JOHN J. O'CONNELL
Attorney General

CHARLES B. ROE, JR.,
Assistant Attorney General

Attorneys for Petitioner, State of Washington
Temple of Justice
Olympia, Washington

FRED C. PALMER
506 Miller Building
Yakima, Washington

JOHN GAVIN
410 Miller Building
Yakima, Washington

NORTHCUTT ELY and
JEROME C. MUYS
Tower Building
Washington 5, D. C.

Attorneys for Petitioners, Ahtanum Irrigation District, et al

MAY 14, 1965.